STATE OF MICHIGAN

IN THE SUPREME COURT

JOYCE McDOWELL, a Formal Special Personal Representative Intestate of the Estates of BLAKE BROWN, decease JOYCE BROWN, deceased, CHRISTOPHER BROWN, deceased, NAOMI FISH, deceased, JOHNNY C. FISH, deceased, JERMAINE FISH, deceased , as Special Conservator of JONATHAN FISH, a minor and as Special Conservator of JOANNE CAMPBELL and JUANITA FISH, adults,

Plaintiffs-Appellees,

v.

CITY OF DETROIT, individually and acting by and through the DETROIT HOUSING COMMISSION,

Defendant-Appellants.

Supreme Court No. 127660

Court of Appeals No. 246294

Wayne Circuit Court
Case No. 00-039668-NO

127660

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PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

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STATEMENT OF THE QUESTIONS PRESENTED

I. DID THE TRIAL COURT AND COURT OF APPEALS PROPERLY FIND THAT PLAINTIFF PLEADED AND SET FORTH SUFFICIENT FACTS TO ESTABLISH A NUISANCE WHICH IS A VALID EXCEPTION TO GOVERNMENTAL IMMUNITY?

Plaintiff-Appellee says "Yes"

The Trial Court said "Yes"

The Court of Appeals said "Yes"

Defendant-Appellant says "No"

II. DID PLAINTIFF ALLEGE AND PRESENT SUFFICIENT RECORD EVIDENCE TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT ON THE CLAIM OF TRESPASS-NUISANCE?

Plaintiff-Appellee says "Yes"

The Trial Court said "Yes"

The Court of Appeals said "Yes"

Defendant-Appellant says "No"

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COUNTERSTATEMENT OF APPELLATE JURISDICTION/ ORDER APPEALED FROM

This tragic case arises out of the fatal December 1, 2000 apartment fire at 2537 St. Antoine in the City of Detroit that took the lives of six children under the age of eight and left two other people seriously injured. Defendants seek relief by way of their leave application which challenges the Court of Appeals affirmance (Exhibit 9) of the Wayne Circuit Court's denial of summary disposition on Plaintiff's tort claims of nuisance in fact and trespass-nuisance (Exhibit 7: Tr 12/18/02 pp 3-4). Defendants' recitation of the underlying proceedings is factually correct. Plaintiff concedes that Defendants' interlocutory application is timely and that this Court has discretionary jurisdiction over the appeal. Nonetheless, for the reasons set forth in this Response, the Court should decline to exercise jurisdiction, deny leave and permit this case to proceed to settlement or trial at the Wayne Circuit Court.

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COUNTERSTATEMENT OF FACTS

A. The Fire Tragedy At 2537 St. Antoine Street

On July 22, 1999, Jo-Ann Campbell entered into a dwelling lease (the "Lease") (Defendants' Exhibit A) with the Detroit Housing Commission for premises at 2537 St. Antoine in the Brewster-Douglas Housing Project in the City of Detroit. As Defendants expressly acknowledged at page 9 of their trial court summary disposition brief, Defendant City of Detroit owns the real estate which Defendant DHC operates and administers. The Lease listed Jo-Ann's children Joyce Brown, Christopher Brown and Blake Brown as her household. Section V of the Lease provided that the "**Resident**," Ms. Campbell was entitled to **"reasonable accommodation of Resident's guests or visitors who may not reside with Resident for longer than fifteen (15) days".** Under the Lease Section VII.A.1 **"Obligation And Rights Of Parties,"** the DHC agreed to, in part:

> **a. Repair and maintain the dwelling unit, equipment and appliances, and the common areas and facilities which are needed to keep the housing in decent, safe and sanitary condition.**
>
> **b. Comply with all requirements of applicable state and local building and housing codes and HUD regulations concerning matters materially affecting the health or safety of the occupants.**
>
> * * *
>
> **d. Maintain electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances, supplied or required to be supplied by Management in good and safe working order and condition.**
>
> * * *
>
> **k. Respond to and satisfy Resident's damage claims, unless Management determines that Resident's damages or loss was not caused by Management but by theft or casualty,**

among other things, in which case Management shall not be liable. (Defendants' Exhibit A; emphasis added).

Subsection A.2.b required Management to conduct routine inspections.

As alleged in the Amended Complaint, in the months prior to December 1, 2000, Jo-Ann Campbell repeatedly informed the Detroit Housing Commission that she was experiencing problems with the electricity and the furnace in the apartment and with sparks coming from a light in the basement and a light in the kitchen (Defendants' Exhibit C: Amended Complaint, ¶ 6). As far back as March 1999, Ms. Campbell had complained of electrical problems at the apartment including at that time, a thermostat on the wall shooting flames and making popping sounds (Exhibit 1: Excerpt of Exhibit 189 from Campbell dep, 3/4/99 Repair Order).

For several months before the fire, Ms. Campbell had also noticed that if she tried to plug electrical appliances into the outlet on the north wall of the first floor bedroom, the outlet always sparked and fumes would come from it that smelled like a burnt piece of paper (Exhibit 2: Campbell dep excerpts, pp 67-69; 74). She described all of these problems to DHC in telephone complaints (Exhibit 2: Campbell dep excerpts, pp 74, 104-105).

Despite her complaints, nobody ever did anything about the outlet (Exhibit 2: Campbell dep excerpts, p 161). She did not use the outlet and she pushed her double bed up against the north wall outlet to keep the children away from it (Exhibit 2: Campbell dep, p 99). Jo-Ann's sister, Juanita Fish, had also noticed the burning smell when she was at the apartment (Exhibit 3: Plaintiff's Answers to Interrogatories and Requests to Produce

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Dated July 26, 20002, Answer 4).

On November 30, 2000, DHC employee J.L. Whitley came by to inspect the premises. Ms. Campbell was there alone and she told Whitley that the socket was sparking and it smelled like it was burning a little (Exhibit 2: Campbell dep excerpts, p 98). Whitley was more interested in flirting with her. Instead of inspecting the sparking socket and the other premises defects, he went to the party store and brought back a six pack of beer which they split and got "high" (Exhibit 2: Campbell dep excerpts, pp 95-96). Despite Ms. Campbell's complaints about the premises, Whitley later prepared a Smoke Detector and Fire Extinguisher Inspection Report and HUD Inspection Report that passed the premises in every respect (Exhibit 4: 11/30/00 Report).

Because Jo-Ann Campbell had to be at the bank the next morning when it opened, on the night of November 30, 2000, her sister Juanita Fish, and her four children, Naomi Fish, Johnny C. Fish, Jermaine Fish, and Jonathon Fish, spent the night at the premises sleeping in an upstairs bedroom so that Juanita could watch Jo-Ann's children the next day (Exhibit 2: Campbell dep excerpts, p 124). On the morning of December 1, 2000, Jo-Ann Campbell left early for the bank while Juanita Fish and the seven children remained asleep (Exhibit 2: Campbell dep excerpts, p 118). Fire broke out in the first floor bedroom and spread rapidly through the apartment resulting in the deaths of Blake Brown, Joyce Brown, Christopher Brown, Naomi Fish, Johnny C. Fish, and Jermaine Fish, and serious injuries to Jonathon Fish and Juanita Fish.

Plaintiffs' experts, Daniel Churchward (Exhibit 5: Churchward Deposition pp 35-42) and Patrick Kennedy (Exhibit 6: Kennedy Deposition pp 44, 52, 60), have confirmed

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that the fire originated in the interstitial spaces of the north wall of the first floor bedroom at the electrical duplex outlet because of an electrical malfunction. This wrongful death lawsuit seeks to recover for these horrendous losses.

B. The Summary Disposition Ruling

On December 18, 2002, Wayne Circuit Judge Edward Thomas announced from the bench that he was denying summary disposition based on governmental immunity on Count I, Nuisance *Per Se*; Count II, Nuisance; and Count III, Trespass (Exhibit 7: Tr. 12/18/02, pp 3-4). He also denied summary disposition on Plaintiffs' contract and breach of warranty claims including the statutory MCL 554.139 covenants of habitability and quiet enjoyment (Counts IV and V). After first denying summary disposition on Count VI, Violation of Housing Code, MCL 125.538, pursuant to MCR 2.116(C)(8), Judge Thomas later reconsidered and granted the motion pursuant to (C)(10) (Exhibit 7: Tr. 12/18/02, pp 5, 12-13). Judge Thomas also held that the facts could not support a proprietary exception to governmental immunity claim under MCL 691.1413 (Exhibit 7: Tr. 12/18/02, p 5).

Defendants appealed and Plaintiffs cross-appealed.

C. The Court Of Appeals Decision

In the November 9, 2004 opinion (Exhibit 9), authored by Judge Patrick Donofrio, the Court of Appeals reversed on the contract claims which the opinion called misnamed tort claims.[1] (Exhibit 9, pp 9-10). The Court affirmed as to Plaintiff's cross-appeal claims (Exhibit 9, pp 10-13).

[1] Judge Michael Talbot joined in Judge Donofrio's opinion and Judge Helene White concurred in the result.

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As to the tort claims, the Court ordered the dismissal of Plaintiff's nuisance per se and trespass claims saying that Plaintiff failed to establish facts demonstrating those two torts (Exhibit 9, pp 5-8). The Court did, however, agree that the record established a genuine issue of material fact with respect to Plaintiff's nuisance in fact and trespass-nuisance claims (Exhibit 9, pp 6-9).

Defendant now seeks leave to appeal from these rulings.

LAW AND ARGUMENT

Standard Of Review

As Defendants correctly assert, this Court reviews decisions on summary disposition de novo. Smith v Globe Life Ins Co, 460 Mich 446 (1999). Additionally, as the Court of Appeals recognized in this case, whether a claim is barred because of immunity under MCR 2.116(C)(7) "requires consideration of all documentary evidence filed or submitted by the parties." Maskery v Univ of Michigan Bd of Regents, 468 Mich 609, 613 (2003), quoting Glancy v Roseville, 457 Mich 580, 583 (1998). Such documentary evidence must be viewed in the light most favorable to the nonmoving party. Lavey v Mills, 248 Mich App 244, 250 (2001). The reviewing court must also accept as true the contents of the complaint unless specifically contradicted by submitted documentary evidence. Maiden v Rozwood, 461 Mich 109, 119 (1999).

I. The Trial Court And The Court Of Appeals Properly Recognized That Where, As Here, Plaintiff Has Offered Evidence To Establish That The Government Controlled Condition Was Patently Unreasonable By Its Very Nature And Was Contrary To Michigan's Fire Prevention Code, Real Property Code And The Michigan Housing Law, Plaintiff Has Stated an Actionable Claim For Nuisance That Avoids Governmental

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Immunity.

Count II of Plaintiff's amended complaint asserts a nuisance cause of action "in the form of a faulty electrical system and an eventual fatal fire," that "Defendant was in the best position to prevent such an occurrence, as it is in control, and responsible, for maintaining the premises" and that "Defendants omissions resulted in interference of Plaintiff's enjoyment of their residence" (Defendants' Exhibit C: Amended Complaint, Count II ¶¶ 14-16). At the December 18, 2002 hearing when the trial judge announced his ruling on the summary disposition motion, he stated that "Hadfield [v Oakland County Drain Commissioners, 430 Mich 139 (1988)] recognized that the judicially made exception to governmental immunity of nuisance per se and public nuisance and also trespass nuisance were viable claims that Plaintiffs could bring against a municipality . That being the situation, the Court is of the opinion that the Hadfield case precludes a grant of summary disposition on those claims brought by Plaintiffs." (Exhibit 7: Tr 12/18/02, p 4). This ruling was made in direct response to Defendants' earlier argument that Hadfield did not recognize nuisance claims (Exhibit 8: Tr 12/11/02, p 7). Then, at the Court of Appeals, in response to Defendants' Issue I on appeal, Plaintiffs asserted at pp 12-15 of her Brief on Appeal that "Plaintiffs Have Stated A Claim In Avoidance Of Immunity For Nuisance Or Nuisance Per Se." Accordingly, it is inexplicable to Plaintiff how Defendants can now claim in their Application that the Court of Appeals "concocted [the negligent nuisance cause of action] on its own "or that the claim is "nothing more than a simple negligence cause of action." Here, the nuisance claim is predicated upon Defendants' flagrant

violation of three statutes.

As the Court of Appeals opinion makes clear, Plaintiff sufficiently alleged that Defendants violated at least three statutory duties. First, MCL 554.139, part of the Real Property Code, mandates compliance with the implied warranty of habitability to maintain the premises in reasonable repair:

> **"§554.139. Covenants of lessor or licensor; construction.**
>
> Sec. 39. **(1) In every lease or license of residential premises, the lessor or licensor covenants:**
> **(a) That the premises and all common areas are fit for the use intended by the parties.**
> **(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant willful or irresponsible conduct or lack or conduct.**
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year
> * * *
>
> **(3) The provision of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein."**

A second statutory duty arises under the Michigan Housing Law, MCL 125.438, which makes it **"unlawful for any owner or agent thereof to keep or maintain any dwelling or part thereof which is a dangerous building as defined in section 139 [MCL 125.539]."** In relevant part, §139 states that 'dangerous building' means a building or structure that has 1 or more of the following defects or is in 1 or more of the following conditions:

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> **"(f) The building, structure, or a part of the building or structure is manifestly unsafe for the purpose for which it is used.**
>
> * * *
>
> **(g) A building or structure used or intended to be used for dwelling purposes, including the adjoining grounds, because of dilapidation, decay, damage, faulty construction or arrangement, or otherwise, is unsanitary or unfit for human habitation, is in a condition that the health officer determines is likely to cause sickness or disease, or is likely to injure the health, safety, or general welfare of people living in the dwelling."**

Finally, with respect to fire safety, Michigan's Fire Prevention Code, MCL 29.23, expressly provides that **"the existence of a fire hazard, of any nature, origin or cause, is declared to be a nuisance ... ."** As the Court of Appeals panel recognized, not only did Defendants have a contractual duty under the Lease to "[m]aintain electrical ... facilities ... supplied to required to be supplied by Management in good and safe working order and condition," they had a statutory duty under the applicable Michigan law not to create or maintain a nuisance.

This Court has recently recognized that when a defendant has violated a statute [in that case MCL 125.587, another section of the Michigan Housing Law], such a violation is a nuisance per se. Soupal v Shady View, Inc, 469 Mich 458, 465 (2003). Here, likewise, the defective conditions in the premises violated a series of statutes. For example, it is readily apparent from the depositions of Plaintiff's experts Churchward and Kennedy that there are genuine issues of material fact with respect to Defendants' violation of the **"manifestly unsafe"** provision in MCL 125.539(f) and the **"dilapidation, decay, damage, faulty construction or arrangement"** that was likely **"likely to injure the health, safety**

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or general welfare of people living in the dwelling" provision in MCL 125.539(g). So long as that electrical defect existed in the premises, the facts establish that the premises were a nuisance at all times and under any circumstances, or that, at the very least, the defect was a nuisance as a matter of fact because the natural tendency of the defective condition was to create danger and inflict injury upon person or property. The trial court and the Court of Appeals correctly held that Defendants are not entitled to summary disposition under Hadfield on Plaintiff's nuisance claims.

While Defendants contend that the nuisance exception does not fit into the narrow category of governmental immunity exceptions, Plaintiff submits that the statutory duties set forth are sufficient to defeat the immunity defense and to establish a jury submissible question of fact for the constitutional factfinder. The Court should deny Defendants' leave application.

II. The Trial Court And The Court Of Appeals Correctly Found That Plaintiff Pleaded And Set Forth Facts To Support A Trespass-Nuisance Claim under Hadfield And Its Progeny.

At the trial court, Defendants asserted that Pohutski v City of Allen Park, 465 Mich 675 (2002), which expressly overruled Hadfield v Oakland County Drain Comm'rs, 430 Mich 139 (1988), barred Plaintiff's trespass-nuisance claim. In Pohutski, the Supreme Court held that "Under a plain reading of the statute, [], the first sentence of § 7 [MCL 691.1407] applies to both municipal corporations and the state, while the second sentence applies only to the state." 465 Mich at 688. The practical effect of the Pohutski majority's construction of the statute is that **future tort claims** against municipal corporations will be

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barred unless the claims fall within one of the five statutory exceptions to governmental immunity: the highway exception, MCL 691.1402; the motor vehicle exception, MCL 691.1405; the public building exception, MCL 691.1406; the proprietary function exception, MCL 691.1413; or the governmental hospital exception, MCL 691.1407(4).

But, in overruling Hadfield, the Pohutski majority applied the rule **prospectively: "After taking into account the entire situation confronting the Court, we hold that our decision shall have only prospective application."** Pohutski, 465 Mich at 696 (emphasis added). Citing Lindsey v Harper Hospital, 455 Mich 56, 68 (1997), for the proposition that "a more flexible approach is warranted where injustice might result from full retroactivity," the Court said that "a holding that overrules settled precedent may properly be limited to prospective application." Id. Accordingly, "after consideration of the effect"of its decision on "the administration of justice," Pohutski's overruling of precedent was limited to prospective application applying only to cases brought on or after April 2, 2002. In all cases, filed before that date, like the case at bar, the interpretation of §1407(1) set forth in Hadfield continues to apply. 465 Mich at 699. See also: Mollhagen v Allegan County Bd of Rd Comm'rs, No. 230316, 2003 Mich App LEXIS 60 (unpubl rel'd 1/4/03) [Exhibit 10]; Horning v Lapeer County Drain Comm'r, No. 229054, 2003 Mich App LEXIS 5 (unpubl rel'd 11/5/03) [Exhibit 11]; Antonian v City of Dearborn Heights, 224 F Supp 2d 1129, 1142-1143 (ED Mich 2002). Thus, under Hadfield, Defendant is not immune because Pohutski was decided on April 2, 2002, and Plaintiff's complaint in this case was filed on December 6, 2000. Here, Plaintiff has pleaded and set forth sufficient facts to support the trespass-nuisance claim, and summary disposition must

be denied.

The Court of Appeals concluded that the trial court properly denied summary disposition, saying:

> "After completing a full review of all the documentary evidence filed or submitted by the parties and applying Hadfield, we conclude that plaintiff has alleged and presented sufficient record evidence to create a genuine issue of material fact allowing plaintiff to proceed with the cause of action for trespass-nuisance." (Opinion, p 9).

The Court of Appeals is correct.

Trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage" Continental Paper v City of Detroit, 451 Mich 162, 164; (1996); Hadfield at 169, 209. To establish trespass-nuisance, a plaintiff must show: (1) condition [nuisance or trespass]; (2) cause [physical intrusion], (3) causation or control [by government]. Continental Paper, at 164; Hadfield at 169. At the Court of Appeals, Defendants challenged only the "cause" or "physical intrusion" element, claiming that the facts alleged by Plaintiff do not support a claim of trespass-nuisance because Defendants did not create or maintain the fire condition on its land and then allow it to spread to the householders' premises. The Court of Appeals properly rejected this "no physical intrusion" argument.

The Court of Appeals recognized that Plaintiff's experts, Daniel Churchward (Exhibit 5: Churchward deposition, pp 35, 42) and Patrick Kennedy (Exhibit 6: Kennedy deposition, pp 44, 52, 60), testified that the fire originated in the interstitial spaces of the north wall of the first floor bedroom at the electrical duplex outlet because of its failure.

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Saying that the fact scenario involved here is that the fire occurred in the apartment after an electrical system malfunction in the walls of the apartment building traveled to an outlet in the apartment, the Court concluded "from a plain reading of the written lease" that the interstitial space is "totally within control of the lessor and not subject to intervention by the leasee as a matter of law" (Exhibit 9: Opinion, p 9).

In Continental Paper, the Supreme Court held that the City was not liable for a fire that originated at an abandoned warehouse complex and spread to plaintiff's building. The City was in the process of having the warehouse complex condemned and demolished, but did not have title to the buildings at the time of the fire. The Court found that condition and cause had been established, but that since the City had neither title nor control over the buildings, it could not be liable under the trespass-nuisance exception. 451 Mich at 163-164.

Here, by contrast, as Defendants have conceded, the City of Detroit owns the real property and the Detroit Housing Commission owns the premises. The lease itself demonstrates that Defendants had the right to exercise, and indeed did exercise, sufficient control over the property to satisfy the control prong. In Continental Paper, the Court cited Buckeye Union Fire Ins Co. v Michigan, 383 Mich 630 (1970), as authority for the proposition that the other two elements were established in Continental. In Buckeye Union, the Court stated that a fire hazard is a nuisance (condition) and a physical intrusion (cause) to neighboring land.

Here, according to Plaintiff's experts, the fire started in the wall of the premises that was owned by Defendants. The Continental Paper Court, at 165, n 7, explained that:

> "Control may be found where the defendant creates the nuisance, **owns or controls the property from which the nuisance arose** or employs another to do work that he knows is likely to create a nuisance. **It may also be found where the governmental defendant is under a statutory duty to abate the nuisance.** Baker v Waste Management of Michigan, Inc., 208 Mich App 602, 606 (1995)." (emphasis added).

In Continental Paper, the Court found no liability because the city did not use the property in any way, "At no point did the city lease the property, collect rents, exclude people from the property, or invite them onto it." 451 Mich at 168. Contrasting Continental with the present case, all three elements for trespass-nuisance are established. Plaintiffs have stated a claim in avoidance of governmental immunity and they have established issues of fact that preclude summary disposition.

Defendants want this Court to hold as a matter of law in this case that there was no "direct trespass" from Defendants' government-owned land onto Jo-Ann Campbell's leasehold property, but they are hoisted on their own petard. According to Plaintiffs' experts' record testimony, the nuisance created by the faulty wiring in the walls or electrical receptacle clearly led to the tragic fire (condition and cause) that originated inside Defendants' wall (Exhibit 8: Tr. 12/11/02, p 29). The fire then intruded into the premises and burned the children to death. Paragraph 24 in Count, II, Trespass in Plaintiffs' amended complaint makes this clear, **"As a direct and proximate result of the failures of the Defendant to properly inspect, maintain and repair the electrical and furnace devices within the premises, a fire developed. . ."** (emphasis added).

This case is indistinguishable from Buckeye Union, supra, where, as here,

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Defendants had notice and knowledge of the condition for months before the fire. Further, in Hadfield, 430 Mich 160, n 9, the Court pointed to Alberts v City of Muskegon, 146 Mich 210 (1906), where plaintiff's property was burned by a fire caused by sparks from a steamroller used by the city to repave a street, the Hadfield Court said that, although, in 1906, sparks were apparently not a trespassory invasion "under present law it is likely that such an invasion would constitute that requisite physical intrusion for trespass-nuisance." See, e.g., Peterson v Clearly, 257 Mich 640 (1932) [allowing negligence recovery for fire destruction of plaintiff's house as result of sparks from steamroller paving road in front of house]. Buckeye v Union and Alberts actually support Plaintiffs' trespass-nuisance claim here.

In addition to these cases, Plaintiff offers the Court the following decision as rebuttal to Defendants' absurd assertion at page 16 of their Brief that "fire is not a 'tangible object' for purposes of the tort of trespass." One hundred twenty- five years ago in Boyd v Rice, 38 Mich 599 (1878), Justice Cooley authored an opinion in a trespass claim where defendant Body negligently permitted fire to pass from his premises to those of plaintiff Rice burning wood on Rice's land. See also: Talley v Courter, 93 Mich 473 (1892) [trespass action for having wilfully, maliciously, and negligently set fire to premises and adjoining those of plaintiff with fire passing over and destroying portion of plaintiff's land]; Fisk v Wabash RR Co, 114 Mich 248 (1897) [recovery under trespass on case theory where sparks and cinders from defendant's engines burned and destroyed portions of plaintiff's land and meadow]. And, in Cribbs v Stiver, 181 Mich 82 (1914), plaintiff recovered a judgment against the road commissioner for starting a fire that burned

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plaintiff's barn while clearing a road with it being held immaterial whether the recovery was based on trespass or trespass on case theory.

Defendants' reliance upon the unpublished and non-precedential Court of Appeals opinion in Morris v Fredenburg, No. 186186 (unpubl 10/25/96) is misplaced. Clearly, in that case, unlike here, defendant had no notice of the wiring defect. The Court of Appeals also observed that defendant had no duty to inspect the premises. Here, by contrast, Defendants knew from the multiple complaints that there were specific problems with electricity in the unit.

Further §IV of the Lease specifically includes in the rent "maintenance services due to normal wear and tear, equipment and utilities furnished by Management without additional cost ... ." Moreover, the issue of the interstitial space of the walls is not one of "common area." The interstitial space between the walls in this case is not a "common area' within the scope of 2 Restatement Torts 2d §360. Instead, that space is by the terms of the Lease, by common sense and by the terms of Restatement §361, a **"Part of Land Retained in Lessor's Control But Necessary to Safe Use of Part Leased."** 2 Restatement Torts 2d §361 provides:

> A possessor of land who leases a part thereof and retains in his own control any other part which is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care
>
> (a) could have discovered the condition and the risk involved, and
>
> (b) could have made the condition safe.

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Comment (b) to this provision further states:

> *b.* The rule stated in this Section applies to the maintenance of walls, roofs, and foundations of an apartment house or office building. It applies also to any other part of the land the careful maintenance of which is essential to the safe use of the rooms or offices or portion of land leased to the various lessees, such as the central heating, **lighting**, or water system. (emphasis added).

Thus, in Leavitt v Glick Realty Corp, 362 Mass 370, 374-376, 285 NE2d 786 (Mass 1972), the Massachusetts Supreme Court held the defendant landlord corporation in an electrical fire case liable under Restatement §361 because the ceiling in the apartment was under the control of the landlord "which had the duty of using due care to see that the wiring within it remained in a reasonably safe condition." In another electrical fire case, the Nevada Supreme Court followed Leavitt in Horvath v Burt, 98 Nev 186, 189, 643 P2d 1229 (Nev 1982), noting in that case that defendant was aware of the dangerous condition because "tenants had made numerous complaints to the management concerning frequent power outages and blown fuses." See also: Boe v Healy, 84 SD 155, 159-160, 168 NW2d 710 (1969) [question of fact as to actual or constructive notice under Restatement §361 regarding hazardous chimney condition where fire spread through walls]. Here, there was no unknown latent defect because Plaintiff had repeatedly complained about the electrical problem: Defendants clearly had notice, and under §361, as well as the express provisions of the Lease, Defendants were responsible for the wiring inside the walls.

Defendants cite cases about the exposed area of the inner walls and the exposed visible area of the outer walls, but they cite no authority for the proposition that the interstitial area between the inner and outer walls is in the control of the lessee, and, on the

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facts presented, the argument defies logic and common sense. At the Court of Appeals, Defendants also asserted that fire is not a "physical, tangible object" for purposes of trespass. The definitions[2] of those three words demonstrate the folly of Defendants' argument. "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." Fire satisfies the definition of "physical." "Tangible"is defined as "capable of being perceived especially by sense of touch: palpable." Fire is obviously "tangible." Finally, "object" is defined as "something that is or is capable of being seen, touched or otherwise sensed." Fire is clearly a "physical, tangible object." If Defendants still doubt that fire satisfies this definition, perhaps they should ask the two surviving, but injured, fire victim Plaintiffs whether they think that fire is a physical, tangible object!

In short, Defendants cavalierly attempt to parse the language of Hadfield and the elements of the cause of action to defeat the claim. In effect, Defendants' argument amounts to splitting hairs over the bodies of six dead children. The trial court and the Court of Appeals properly denied Defendants' motion for summary disposition with respect to the trespass-nuisance claim. This Court should deny the leave application.

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[2]All definitions are from Webster's New Collegiate Dictionary, Merriam-Webster (1976).

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RELIEF REQUESTED

For all the foregoing reasons, the trial court properly denied governmental immunity on Plaintiffs' claims for trespass-nuisance and nuisance in fact. The Court of Appeals properly affirmed these rulings. This Court should deny Defendants Application for Leave to Appeal or for other relief and permit this case to proceed to settlement or trial at the Wayne Circuit Court.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

Dated: February 21, 2005

By: Victor S. Valenti

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